UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

DIVERSICARE LEASING CORP. d/b/a WURTLAND NURSING & REHABILITATION CENTER

and

Case 9-CA-40471

DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICE UNION, SEIU, AFL-CIO

Eric V. Oliver, Esq., for the General Counsel. Timothy P. Reilly, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case is before me upon a joint motion filed by the parties pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, providing for "stipulations of facts that waive a hearing and provide for a decision by the administrative law judge." By Order of February 23, 2004, I approved the stipulation of facts and set a time for the filing of briefs. Counsel for the parties submitted their briefs on April 5, 2004, dealing with the issue raised in the complaint, dated October 31, 2003, that the Respondent withdrew its recognition of the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent's answer, dated November 5, 2003, admitted the jurisdictional allegations in the complaint and denied the substantive allegation of a violation of the Act. On the entire record, consisting of the complaint, the answer and, having waived a hearing before an administrative law judge, the stipulation of facts (including exhs. A through F as attachments), and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following stipulated

Findings of Facts

I. Jurisdiction

Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center (the Respondent) is engaged in the operation of a nursing home at Wurtland, Kentucky. During the past 12 months, in conducting its operation described above, the Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Wurtland, Kentucky facility goods valued in excess of \$50,000 from suppliers located outside the Commonwealth of Kentucky. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO, (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

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At all material times, Ralph Wright has held the position of administrator and is a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

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All full-time and regular part-time and PRN service and maintenance employees employed by the Respondent at its 100 Wurtland Avenue, Wurtland, Kentucky facility, as described in article I of the collective-bargaining agreement effective June 30, 1998, between the Respondent and the Union (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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At all material times since about October 10, 1997, the Union has been the designated exclusive collective-bargaining representative of the unit. The Respondent's recognition of the Union as the unit employees' representative has been embodied in the collective-bargaining agreement described above.

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On July 1, 2003, and following the expiration of the collective-bargaining agreement described above, Tammy Herrington, a unit employee, filed a decertification petition with Region 9 of the National Labor Relations Board, a copy of which was given to Ralph Wright on such date. (A copy of the petition in the matter of Case 9–RD–2038 is attached to the stipulation as exh. B.) Included with the decertification petition was an employee petition containing current signatures of more than 50 percent of the unit employees. The caption on the employee petition reads as follows: "We the employee's of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199" (sic) (A copy of the employee petition is attached to the stipulation as exh. C.) Following its receipt of the foregoing information, the Respondent compared the above-referenced signatures with employee signatures that were inscribed on July 11 and August 8, 2003 employee paycheck receipt lists and determined that the employees' petition was signed by over 50 percent of the employees in the unit.

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By letter dated August 12, 2003, the Respondent advised the Union that because it (the Union) no longer represented a majority of the unit employees, it (the Respondent) was withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit. (A copy of Wright's August 12, 2003 letter to the Union is attached to the stipulation as exh. D.)

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The Respondent's decision to cease recognizing the Union as the exclusive collective-bargaining representative of the unit was based solely on the information described above.

III. Statement of the Issue Presented

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The parties agree that the sole issue in the instant case is whether the Respondent lawfully withdrew recognition from the Union based upon its review of an employee petition signed by a majority of bargaining unit employees stating: "We the employee's of Wurtland Nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199." (sic)

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Analysis

The issue, whether the Respondent, Diversicare Leasing Corp., lawfully withdrew its recognition of the SEIU as the bargaining agent of its employees when its employees submitted a petition, "for a vote to remove the union," is governed by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). *Levitz* holds that an employer must have objective evidence of a lack of majority support for the union among the employees to counter the rebuttable presumption in favor of continued majority support. "[F]rom the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status." Id at 720. Without such objective evidence, an employer cannot unilaterally withdraw its recognition of the union as the bargaining representative of its employees.

The presumption in favor of continued majority support is predicated upon two basic purposes of the Act, as explained in *Levitz*, supra, continuity in the bargaining relationship which fosters industrial peace and stability, and the employee's right to designate a collective-bargaining representative without the employer's interference with these rights. Only when an employer has objective evidence that the bargaining representative no longer enjoys majority support can recognition be withdrawn.

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This objective standard in *Levitz* is more stringent and replaced the subjective "good faith" test in *Celanese Corp.* 95 NLRB 664 (1951). While the Supreme Court articulated a similar subjective test in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the door was left open for the Board to adopt a more stringent standard. Conceivably, an employer, under the impression that the union lost majority support, could withdraw recognition of the union under the old standard, even though the union had not actually lost its support among the employees. The subjective standard could undermine the democratic purposes of the Act and the fairness of representation.

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The Respondent contends that there is no need for the Board to determine the intention of the employees who signed the petition, because the employees had clearly indicated their intent to oust the Union. To illustrate, the Respondent compares the instant petition with that in *Pic Way Shoe Mart*, 308 NLRB 84, 87 (1992), where the employee petition stated, "OUR CONTRACT HAS JUST EXPIRED & WE WOULD LIKE TO HAVE A VOTE ON WHETHER TO HAVE A UNION OR NOT. . . . " The Board found that the employees had expressed their desire to have a vote, rather than a unilateral withdrawal of recognition. In contrast, the employee sentiment is expressed far more unequivocally in the instant scenario, according to the Respondent.

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Nevertheless, it is conceivable that the employees signed this petition, because they wanted a vote. The term "to remove" may have been an indication to them of what the vote was all about, rather than the signatories' expression of their sentiment. Given that uncertainty, the employer cannot unilaterally withdraw recognition. "If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees. . . . [and] an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril." *Levitz*, supra at 723, 725.

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The Respondent also distinguishes *Laidlaw Waste Systems*, 307 NLRB 1211 (1992), where the employee petition was, "to find out if the majority of Laidlaw employees would like to take a vote on the union." As in *Pic Way Shoe Mart*, supra, the Board found that a majority of

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employees had not demonstrated a lack of majority support for the union without a vote. Significantly, both *Pic Way Shoe Mart* and *Laidlaw*, share with the present case similar petition language demanding a vote. However, in *Easton Hospital*, 335 NLRB 1091 (2001), also cited by the Respondent, the Board found employee dissatisfaction with union representation based upon the statement in the petition: "We feel that we have been misrepresented and therefore would like an immediate opportunity to revote to determine whether we want the union to continue its representation..." *Easton Hospital* was decided under the prior standard, the "good faith" test. The precedential value of *that decision* is extremely limited, because the Board expressed its view that it would reach a different result under the *Levitz*, standard.

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Respondent also cites *Voca Corporation*, Case 9–CA–38812 (May 30, 2002) which involved a petition whose language justified a legal refusal to recognize the bargaining representative. But the petition's language did not call for or even mention a request for a vote. It stated, "We the undersigned, current employees of . . . wish to decertify our affiliation and union representation with [the union]" and, "We, . . wish to no longer recognize our affiliation and representation by [the union]."

In the present case, however, the use of the term "vote" is evidence that the petitioners wanted an election.

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The Respondent finally argues "that the specific supersedes the general," and that consideration of all the words on the petition leads to the conclusion that a majority of the employees no longer wanted the Union." Yet it is clear that the word "vote" necessarily implies a choice. The "wish for a vote to remove" may be assumed by some signatories as an opportunity to vote for or against removal. The petition would have been clear and unambiguous if it had stated, "wish to remove."

The General Counsel submits that an irrebuttable presumption of majority support exists during the effectiveness of a collective-bargaining agreement, and a rebuttable presumption upon the expiration of the agreement. Lee Lumber & Building Material Corp., 322 NLRB 175 (1996). In order to rebut the presumption of majority status, the employer must prove that there was an actual loss of majority support for the union. Levitz, supra. The choice of words in the petition, according to the General Counsel, was insufficient to show actual loss, it was a showing of interest in having an election. A request for a vote coupled with an expression of dissatisfaction with the incumbent union still connotes a choice to be made. Under these facts, the employer's reliance on a showing of interest does not constitute proof of majority opposition

determination of whether a refusal to bargain is established.

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When an employer withdraws recognition of a certified bargaining representative without an election or unequivocally clear intention of the employees, an 8(a)(5) violation has been committed. "Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether." *Karp Metal Products*, Co., 51 NLRB 621 (1943). I accordingly find that the Respondent violated Section 8(a)(5) and (1).

to the union. The employer's good faith belief of majority opposition is irrelevant to the

Conclusions of Law

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1. The Respondent, Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center, is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

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- 2. The Union, District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. All full-time and regular part-time and PRN service and maintenance employees employed by the Respondent at its 100 Wurtland Avenue, Wurtland, Kentucky facility, as described in article I of the collective-bargaining agreement effective June 30, 1998, between the Respondent and the Union, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
 - 4. The Union has been the exclusive collective-bargaining representative of the unit.
- 5. By withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit, the Respondent has been failing and refusing to bargain collectively and in good faith, in violation of Section 8(a)(1) and (5) of the Act.
- 6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
- On the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I issue the following recommended¹

REMEDY

The remedy for a failure to bargain is an order to bargain in good faith with the Union, an order to cease and desist from all such unfair labor practices, and to post notices to that effect.

ORDER

The Respondent, Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center, Wurtland, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Withdrawing recognition of the Union and refusing to bargain collectively and in good faith with the Union in the appropriate unit.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit, with respect to wages, hours, and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed instrument.

 ¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.
 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

- (b) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2003.
 - (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 26, 2004.

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Administrative Law Judge 25 30 35 40 45

² If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal Labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVE YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition of the Union as the collective-bargaining representative of our employees and refuse to bargain collectively and in good faith with the Union in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of our employees in the unit, with respect to wages, hours, and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

		WURTLAND NURSING & REHABILITA CENTER	
		(Employer	·)
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.